IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.1515 OF 2003
IN
SUMMARY SUIT NO.2323 OF 2000

Jagat Pravinchandra Shah ...Plaintiff
Vs.
Smt. Mamta Pankaj Dharia & Ors. ...Defendants

Mr.S.N.Vaishnava i/b. N.N. Vaishnawa for Plaintiff
Mr. R.T. Parekh for Defendants

CORAM: SMT.R.S.DALVI,J.
DATED: 26TH JULY, 2005

P.C.

1. The Plaintiff has filed this summary suit for recovery of Rs.1378000/- along with costs and interest on the principal amount Rs.10 lakhs at the rate of 18% per annum.

2. The Plaintiff took out a Notice of Motion for attachment before Judgment. The Defendants were represented by their Advocate at the time of the ad-interim application made on 10th May, 2000 in that Notice of Motion. The Defendant's Advocate made a statement that they do not intend to leave or to dispose of or transfer in favour of any third party rights in respect of the premises described in para (e) of that Notice of Motion. Their statement was accepted. No further orders were passed. Liberty to mention was given. The Defendants waived service.

3. Despite the waiver of service the Defendant's Advocate wrote to the Plaintiff's Advocate that he had filed his Vakalatnama only in the Notice of Motion and that the Defendants would have to be served the Writ of summons.

3. The Plaintiffs sent the writ of summons to the Defendants by RPAD. An affidavit of service was filed on 22nd September, 2000. The affidavit showed that the registered packets sent to the Defendants were returned with the endorsement ''Not claimed. Returned to sender''.

4. The original registered packets sent to each of the three defendants in the suit filed with the affidavit of service are produced before the Court. The postal endorsement is seen to have been made. The packets also show an intimation given to the Defendants, that the registered packets were sought to be served.

5. The postal acknowledgment card shows the service made on 16th August, 2000. The intimation was given on 18th August, 2000. The packets have been returned to sender on 29th August, 2000.

6. It is seen that the service sought to be affected was not claimed by the Defendants. This has

to be seen in view of the further fact that the Defendants had knowledge and information of the suit, they had appeared at the time of the ad-interim reliefs applied for by the Plaintiff in the Notice of Motion for attachment before Judgment, they were served the copy of the plaint and Notice of Motion, they were represented by their Advocate, and their Advocate had waived service. Later it was contended that he appeared only in Notice of Motion and hence the service of the Writ of Summons by registered post was further effected. At the time of the service, therefore the Defendants knew what was being served upon them. The Defendants did not claim the packets, despite the intimation given to them.

7. The Defendants contend that the service is not properly effected because the service is not refused; it is only ‘‘ not claimed’’.

8. The Defendant’s Advocate relied upon the Judgment of Justice Khanwilkar in a case of Lalmani Ramnath Tiwari Vs. Bhimrao Govind Pawar reported in 2001(3) BCR 21 in which it has been held that ‘‘Service not claimed’’ can be for various reasons other than refusal, and unless there is positive proof of service as per principles of law, service cannot be presumed. The Judgment further observes that the denial of receipt by a Defendant was sufficient rebuttal of the presumption.

9. Mr. Parekh therefore, contends that he has denied the service. Hence, the presumption of service is rebutted.

10. This rebuttal has to be seen as per the facts of each case. In this case the endorsement is made by the postal authority in the usual conduct of its business. The service affected by post shown by the acknowledgment otherwise carries the presumption that it was affected under the Evidence Act. The denial of the Defendants has to be seen in the light of dates of the various endorsements during postage showing the initial service upon the Defendants on 16th August, 2000 till it was returned back to the Court (sender) on 29th August, 2000. The material endorsement is that of intimation given to the Defendants on 18th August, 2000. Since the intimation was given it was for the Defendants to claim the registered packets. The Defendants did not claim the registered packets. Hence a further endorsement in red is made by the Postal Authority that it was not claimed. The Judgment showing various reasons for not claiming the service other than refusal has to be considered in that light. In this case the service was not refused by the Defendants. The intimation though given was not availed and the packets were not claimed. That was the reason for the Postal Authority's endorsement ''not claimed''. That reason tentamounts to and is

equivalent to ‘‘refusal’’ to the postal authorities at the time the packet is sought to be delivered.

11. It is important to note that the suit was already filed and one application for attachment before judgment was already moved. The Defendants were represented and knew about filing of the suit. The Defendants were specifically served despite waiver of service and having known of the suit being filed and having been given intimation by the postal authorities they did not claim the registered packet. The entire exercise came to naught. Though therefore, the Plaintiffs did as directed by the Defendant’s Advocate, the Defendants did not avail of the service sought to be affected upon them by not claiming the packets. In the facts of this case, therefore, it tentamount to the refusal.

12. It may be mentioned that the concept of waiving service primarily relates to service of the writ of summons. That is the only service contemplated in Order V of the C.P.C. A copy of the draft Notice of Motion had been served when the ad-interim application was made. The waiver of only such Notice of Motion has to be specified by the Defendants’ Advocate. That having not been done, the waiver must be taken to be of the writ of Summons which was to be served as per the procedure laid down in Order V of the C.P.C.

13. It is seen that the service of the writ of summons was not even required to be made as it was waived. It was nevertheless made. It was not claimed. It was avoided or refused to be claimed despite the intimation. It was in fact and in terms refused. The Defendants therefore, must thank themselves for what happened in the suit filed against them.

14. An Ex-parte decree came to be passed against the Defendants. The Defendants have sought to set aside that decree. The Defendants made an application for stay of the execution of the decree.

15. The order came to be passed by Justice S.A.Bobde on 21st July, 2003 staying the execution of the decree upon the appointment of the Court Receiver for the property described in the title of the plaint. That is the place of the residence of the Defendants.

16. Under that ad-interim order the Court Receiver was appointed without the power to sell the premises and was to allow the Defendants to reside in the premises without security. He was to take formal possession and allow the Defendants to reside in the premises on usual terms and conditions as his Agents.

17. The Defendants appealed that order. The order

came to be confirmed by the Division Bench on 17th November, 2003. The order of appointment of the Court Receiver, therefore, came to be confirmed. The Defendants were to be the Agents of the Receiver on usual terms and conditions. Consequently the Defendants have to give formal possession to the Court Receiver and execute the agency agreement containing the usual terms and conditions.

18. The Court Receiver has made a detailed report dated 16th March, 2005. about what has transpired after his appointment.

19. The report shows that pursuant to the order dated 21st February 2003, the Receiver sought to implement that order and fixed appointment on 8th September, 2003 to take possession of the premises. The possession could not be taken because the premises was found locked. On 17th March, 2004 the Receiver took formal possession of the premises but Defendant No.1 refused to give the undertaking to the effect that she was to act as the Agent of the Court Receiver as per the order dated 21st July, 2003.

20. On 24th January, 2005 the Receiver affixed one possession board on the main entrance door of the suit premises. Defendant No.1 handed over possession to the Receiver, to use and occupy the premises as Receiver’s Agent.

21. The Receiver fixed a meeting for determination of the quantum of royalty on 16th March, 2005 (the date of the report) and for settling the draft agency agreement and the undertaking. Defendant No.1 refused to execute agreement or the undertaking or to provide for the comprehensive Insurance policy as required.

22. The Receiver heard the parties. The Plaintiff submitted to the Receiver that Rs.30,000/- could be obtained per month from the premises for which the Receiver was appointed and therefore, the royalty be fixed as Rs.20,000/-. The Defendants contended that they would obtain clarification from the Court since they contended that no royalty was payable. The Receiver fixed the adhoc royalty at the modest amount of Rs.2000/-.

23. The Defendants did not apply to Court after 16th March, 2005 for any clarification. The Defendants have not paid even the adhoc amount of Rs.2000/- fixed by the Receiver.

24. The Advocate for the Defendants contends that no amount of royalty is payable. The order of Justice Bobde dated 21st July, 2003 shows that the Defendants have to be agents of the Court Receiver. Hence, the execution of the agency agreement is implicit in that order. The order further shows that the Defendants

would be the agents on the usual terms and conditions but without security. Hence, the exception is made for security but for not royalty. Royalty is the amount payable per month and has nothing to do with the security.

25. It is seen that in the suit Rs.1378000/- are claimed. An Ex-parte decree is already passed. That amount has to be secured. Hence, the Receiver is appointed. The very order of the appointment of the Receiver is frustrated if all that the Defendants do is to hand over the formal possession and not pay any royalty to the Receiver. The Defendant's statement at the time of the initial ad-interim order in the ABJ application dated 10th May, 2000 itself protects the property against sale and transfer. Further order of appointment of Court Receiver must further enure for the benefit of the Plaintiff who has already obtained the decree and which decree is stayed upon that condition. The Defendant has frustrated that condition. The order is not complied. In fact the order is disobeyed. The Defendants therefore, do not deserve the reliefs sought in this Notice of Motion.

26. The Notice of Motion is dismissed with costs, fixed at Rs.3000/-condition precedent. The Receiver shall continue in execution of the Decree. The execution shall proceed after three weeks.

(SMT.R.S.DALVI,J.)